

**ANNUAL REPORT
OF THE
ENVIRONMENTAL QUALITY
SERVICE COUNCIL**



**Indiana Legislative Services Agency
200 W. Washington St., Suite 301
Indianapolis, Indiana 46204-2789**

November, 2003

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2003

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Environmental Quality Service Council

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Valerie Ruda
Fiscal Analyst for the Council

November, 2003

A copy of this report is available on the Internet. Reports, minutes, and notices are organized by committee. This report and other documents for this Panel can be accessed from the General Assembly Homepage at <http://www.state.in.us/legislative/>.

FINAL REPORT

Environmental Quality Service Council

I. STATUTORY AND LEGISLATIVE COUNCIL DIRECTIVES

The Indiana General Assembly enacted P.L. 240-2003 (HEA 1671) directing the Environmental Quality Service Council (EQSC) to do the following:

- (1) Consider whether the rulemaking operations of the environmental rulemaking boards are sufficiently independent of the influence of:
 - (A) the Department of Environmental Management (IDEM); and
 - (B) other state agencies or entities.
- (2) Consider the overall efficiency of rulemaking operations of the environmental rulemaking boards.
- (3) Submit its final report on the matters described in subdivisions (1) and (2) to:
 - (A) the governor; and
 - (B) the executive director of the legislative services agency.

The Legislative Council assigned the following additional responsibilities to the EQSC:

- (1) Study the advisability of establishing an Environmental Crimes Task Force as proposed in SB 114-2003.
- (2) Study the advisability of establishing a study committee to study the long term cost effectiveness and in-field performance of storm sewer drainage products used in the construction of publicly funded roads and other infrastructure throughout Indiana as proposed in HR 59-2003.

II. INTRODUCTION AND REASONS FOR STUDY

The activities of the EQSC in 2003 were conducted to discharge the EQSC's various responsibilities under P.L. 248-2002 (SEA 121) and other acts imposing responsibilities on the EQSC.

III. SUMMARY OF WORK PROGRAM

The EQSC met six times on the following dates and at the following locations:

1. July 15, 2003	Conference Room C 302 W. Washington St. Indianapolis, Indiana	Environmental rulemaking
2. August 12, 2003	Conference Room A 302 W. Washington St. Indianapolis, Indiana	Air issues
3. September 3, 2003	Conference Room A 302 W. Washington St. Indianapolis, Indiana	Water issues
4. October 8, 2003	Conference Room B 302 W. Washington St. Indianapolis, Indiana	Environmental crimes, IDEM budget, Excess Liability Trust Fund, drinking water fees, rulemaking
5. October 22, 2003	State House, Room 130 200 W. Washington St. Indianapolis, Indiana	Brownfields, waste tires, rulemaking
6. October 29, 2003	Conference Room B 302 W. Washington St. Indianapolis, Indiana	Preparation of final report, solid waste districts and recycling, LaGrange Sewer District, wetlands

IV. SUMMARY OF TESTIMONY

First Meeting - July 15, 2003

Environmental Rulemaking. Representatives of the Indiana State Bar Association presented on Indiana environmental rulemaking. Marcia Oddi, Environmental Information Solutions, gave a rulemaking overview. Guinn Doyle, Barnes & Thornburg, discussed the history and membership of the Environmental Law Section. Betsy DuSold, Eli Lilly and Company, discussed recommendations for changes in the environmental rulemaking process. Brad Sugarman, Sommer Barnard & Ackerson, discussed the changes in the environmental rulemaking process required by P.L. 240-2003 (HEA 1671).

The presenters responded to questions from the council concerning communications among the parties involved with respect to rulemaking changes, the steps required before a rule takes effect, the total time required for rulemaking, the schedule of publication of rulemaking notices in the Indiana Register, the level of independence of the environmental rulemaking boards from IDEM, educational opportunities for board members, operational costs of the boards, conflicting rule interpretations by the EPA, and review of proposed rules for legality. The presenters offered to assist the council in its examination of rulemaking issues.

Tim Method, IDEM, discussed the volume of environmental rulemaking in recent years, the various ways rulemaking is initiated, the involvement of various IDEM personnel in the rulemaking process, and the involvement of workgroups in the process. He noted the changes in the process recently made by IDEM. Nancy King, IDEM, discussed IDEM's implementation of the changes required under P.L. 240-2003 (HEA 1671) regarding the adoption of rules and non-rule policy documents. Mr. Method and Ms. King responded to questions from the council concerning the effect of endangered industry restrictions on rulemaking, and the timeline for finalizing the new source review rules.

Second Meeting - August 12, 2003

Air Issues. Janet McCabe, IDEM, presented reports on the Eight-Hour Ozone Standard, Ambient Air

Quality Standards for Fine Particulate Matter (PM 2.5), the Federal New Source Review Program, and the Draft Non-Rule Policy Document on Guidance for Interpretation of the Term "Emission Data." In response to questions from the council, Ms. McCabe commented about: IDEM's use of local contact groups for recommendations concerning air pollution control measures; the ways in which IDEM accounts for migration of air pollution into an area that has no control over the source of the pollution; planning efforts with neighboring states concerning air pollution control; data available on relative contributions to air pollution from motor vehicles and other sources; the extent to which enforcement of NOx rules will help meet air pollution standards; the use of air pollution monitors; the relationship between attainment areas and metropolitan statistical areas; local fiscal impact of meeting air pollution standards; federal rules under consideration concerning diesel engines and diesel fuel; vehicle emissions testing; the need for data on the health effects of fine particulate matter; the different interests and attitudes among the states concerning new source review; the trade secret exception to the public records disclosure law; electrical hook-ups at truck stops; and the availability of time extensions for compliance with ozone and fine particulate matter standards.

Andrew Knott, Hoosier Environmental Council, presented a report on Indiana air pollution issues, and commented about the applicability of new source review to power plants. Bernie Paul, Eli Lilly & Company, presented a report on Clean Air Act issues, and commented on appeals of Title 5 air permits.

Third Meeting - September 3, 2003

Water Issues. Jim McGoff, State SRF Program, presented a report on the revised structure of the program. He commented on plans for the program to streamline operations and increase loan capacity, the need to adjust interest rates to preserve appropriate subsidy levels, the number of loans closed this year, project planning, priority of combined sewer overflow projects, the loan issuance and technical review process, and the availability of grants from the program.

Nancy King, IDEM, presented a report on the Allen County NPDES General Permit for on-site residential sewage discharging disposal systems. She commented on monitoring requirements and schedules, the cost of testing, and penalties for failure to comply with the rule. Sen. Gard commented on the possible use of the Allen County program as a model for other areas with similar problems. Ms. King also presented a report on the amendments in P.L. 231-2003 (HEA 1221) concerning variances from water quality standards in NPDES permits.

Pat Carroll, IDEM, presented a report on groundwater quality standards, and commented on acceptable nitrate levels associated with septic systems and costs for testing of well water.

Howard Cundiff, Indiana State Department of Health (ISDH), presented a report on the ISDH proposed rule on onsite wastewater treatment. ISDH is concerned that onsite systems do not violate groundwater standards and that well water on a property with an onsite system must be protected. In some cases, a treatment system within the onsite system is required in order to meet groundwater standards. The cost of a treatment system can be substantial. Three public hearings have been held on the proposed rule. Changes to the proposed rule, including reference to alternative and experimental technology, are under consideration. Mr. Cundiff commented on the extent to which treatment systems will be required, and on the depth to which soil for an onsite system is tested.

Joe Tutterrow and Jamie Palmer, Rural Wastewater Initiative, presented a report on the Indiana Land Resources Council Rural Wastewater Task Force. They, along with Mr. Cundiff, responded to questions from the council concerning the development of new technology for onsite systems, the standards used to determine whether an onsite system is failing, the means of tracking the rate of system failures, repairs to failing onsite systems and the responsibility to determine the nature of a required repair, the difficulty in determining whether water contamination is from an onsite system or from another source, the use of aerator systems, and the advisability of mandatory maintenance programs.

Bruno Pigott, IDEM, presented reports on residential and community wastewater treatment systems and Stormwater Rules 5, 6, and 13 (327 IAC 15-5, 15-6, and 15-13).

Mary Ellen Gray, IDEM, presented a report on changes to surface water quality standards. A workgroup organized by IDEM is reviewing water quality standards and will make recommendations to IDEM. Workgroup information is posted on IDEM's website. She also presented a report on impaired waters under Section 303(d) of the Clean Water Act, and commented on the methodology for testing water, the consequences of the addition of a water body to the impaired waters list, and consideration of contamination by different types of E. coli.

Sen. Gard commented on the lack of funding for municipalities for activities required under Rule 13, and urged IDEM to delay implementation of Rule 13 until funding issues are resolved. Mr. Method commented that the rules are proceeding on the basis of implementing aspects that can be funded and preparing for those for which funding might be developed later. Council members commented on the potential effects of the reduction of construction areas subject to stormwater regulation from five acres to one acre.

Mr. Method presented reports on concentrated animal feeding operations and on changes to the environmental rulemaking process in P.L. 240-2003 (HEA 1671), including the provision prohibiting a refund of a permit application fee if the permit application concerned the renewal of a permit.

Tonya Galbraith, IDEM, presented a report concerning the CSO Notification Rule.

Fourth Meeting - October 8, 2003

Water Pollution Control Board (WPCB) Rulemaking. John Fekete, Chairman of the WPCB, presented on the WPCB's rulemaking activities and procedures. He described the organization and duties of the WPCB, the rules currently in process, and the use of workgroups. He stressed the importance of the WPCB maintaining linkage with the General Assembly and the EQSC, and commented on various matters concerning the independence of the WPCB from IDEM, staffing, training, time commitments of board members, cooperation among the environmental rulemaking boards, and adoption of rules more stringent than federal law.

Environmental Crimes. Senator Luke Kenley presented on the issue of environmental crimes. Under IC 13-30-6-1, it is a Class D felony to intentionally, knowingly, or recklessly violate a rule or standard adopted by one of the environmental rulemaking boards, or a determination, permit, or order made or issued by the commissioner of IDEM. Senator Kenley's SB 114-2003 proposed the creation of the Environmental Crimes Task Force, which would propose statutory definitions of all environmental crimes. Senator Kenley asked that the council endorse the proposed legislation for the next legislative session.

IDEM Budget. Ryan Pastorius, IDEM, presented a report on IDEM budget issues, including IDEM reliance on dedicated funds, IDEM budget priorities and budget cuts, staffing and elimination of vacant positions in IDEM, and administratively extended NPDES permits.

Underground Storage Tanks. Bruce Palin, IDEM, presented a report on underground storage tank and Excess Liability Trust Fund (ELTF) issues, including administrative costs for the ELTF, costs of contracting for processing claims on the ELTF, the possibility of bonding to help ELTF remain solvent, comparative uses of the ELTF and the Petroleum Trust Fund, and IDEM priorities for underground storage tank cleanups.

Scott Imus, Indiana Petroleum Marketers and Convenience Store Association, stressed the importance of the solvency of the ELTF, and indicated that his association is looking at funding proposals.

Maggie McShane, Indiana Petroleum Council, stressed the importance of the ELTF to her members. She observed that cleanup activities through the ELTF have been very successful, and that the fund has been used for the cleanup of more than 4,000 sites.

Anne LaRue, Everybody's Oil Corporation, stressed the importance of the solvency of the ELTF and supported the bonding suggestion. She also suggested raising the tax on diesel fuel as a funding option.

Miriam Dant, Baker & Daniels, stated that the ELTF is in trouble even without consideration of

administrative costs because of the growing number of cleanups. She indicated that IDEM is put in a position of considering lower cleanup standards because of funding issues.

Drinking Water. Pat Carroll, IDEM, presented a report on Indiana's safe drinking water program and new drinking water fees, including programs to protect surface water systems, federal funding for water system security, and the impact on the drinking water revolving loan fund.

Fifth Meeting - October 22, 2003

Waste Tires. Bruce Palin, IDEM, presented a report on waste tires. He updated the council on the recent fire at the CR3 waste tire processing plant in Muncie and expressed concerns with storage of tires at processing facilities. He related current funding issues with respect to the waste tire management fund, and described waste tire cleanup efforts. He discussed with the council current uses of waste tire products and ideas for the development of markets.

Senator Gard expressed interest in clarifying the statute that governs distributions from the waste tire management fund and in requiring financial assurance from the applicant before issuance of a permit for waste tire processing.

Joe Brister, Michelin North America, presented a report on end of life tire management programs. He described programs supported by Michelin and the Rubber Manufacturers Association that promote the elimination of stored scrap tires, the effective management of annually generated scrap tires, and the development of markets for scrap tire products. David Lamm, Blue River Environmental, presented a report urging the use of tire chips in lieu of aggregate in the construction of on-site sewage disposal systems.

Solid Waste Management Board (SWMB) Rulemaking. Mayor William Graham of Scottsburg, Acting Chairman of the SWMB, presented on the SWMB's rulemaking procedures. In his twelve years as a SWMB member he has not perceived any undue influence by IDEM on the proceedings of the SWMB. Because the subjects on which the SWMB adopts rules usually do not affect him directly, he believes he can maintain independence from the views of IDEM or another party that participates in the rulemaking process. In recent months, IDEM has taken a less active role in organizing the meetings of the SWMB.

Brownfields. Kay Nelson, Northwest Indiana Forum, presented a report on brownfield properties in northwest Indiana. There are numerous brownfield sites in northwest Indiana comprising approximately two thousand acres. The sites are owned by numerous entities and are subject to various state and federal environmental cleanup actions. Redevelopment partnerships are being formed to accomplish cleanup and restore the sites to useful purposes.

Maureen Swed, Shirley Heinze Land Trust, presented a report on the activities of the trust in partnership with the City of Gary and various private and governmental entities to restore dune and swale habitat in the city.

Samuel Senn, Bascor, presented a report on a three hundred twenty-five acre brownfield site restored through the efforts of a partnership of various private and governmental entities. He discussed the community benefits of the restored brownfield, which include a golf course, youth golf academy, walking trails, fishing, bird watching, and wetlands. The council discussed with Mr. Senn, Ms. Nelson, Commissioner Kaplan, and Tom Baker, IDEM, comparative cleanup requirements, procedures, closure testing and other requirements, and closure documentation with respect to the federal Resource Conservation and Recovery Act and the state Voluntary Remediation Program.

Gabrielle Hauer, IDEM, presented a report on brownfields and IDEM's brownfield program. She addressed financial assistance for brownfield activities, technical assistance, community assistance, outreach, and education, other IDEM programs that interface with the brownfields program, closure documentation, and statistics on brownfield activities. Calvin Kelly, Indiana Finance Development Authority (IDFA), presented a report on IDFA's brownfield activities. He provided statistics on historical and future IDFA funding for brownfields investigation and remediation. IDFA has undertaken legislative initiatives concerning brownfields, including redefinition of the term and amending of the voluntary remediation tax credit.

Sixth Meeting - October 29, 2003

LaGrange County Sewer District. Representative Wolkins summarized the issues in the dispute between Gordon's Campground (Campground) and the LaGrange County Sewer District (District) over service rates. P.L. 239-2003 (HEA 1659) attempted to address the issues, but the dispute continues.

Sandi Bubb, Campground, described the dispute from the perspective of the Campground, and the Campground's contention that the District's bills are excessive. Dennis Harney, Indiana Manufactured Housing Association and Recreation Vehicle Indiana Council, Inc., expressed support for the position of the Campground.

John Gastineau, attorney for the District, described the dispute from the perspective of the District and the District's contention that the rates charged to the Campground are legal.

Council members questioned the reasonableness of the rates charged to the Campground by the District. Representative Wolkins stated that the rates do not appear to be reasonable, and that there is a lack of communication between the Campground and the District. He suggested that certain areas of expertise should be required of district board members and that district rates should be subject to review by a state entity such as the Indiana Utility Regulatory Commission.

Wetlands update. Felicia Robinson, IDEM, summarized the recent Indiana Supreme Court decision in IDEM vs. Twin Eagle LLC, 2003 WL 22204184, Ind., Sep. 23, 2003. She stated that the court upheld the IDEM's positions concerning state jurisdiction over waters no longer under federal jurisdiction. Tim Method, IDEM, described the manner in which IDEM has applied the NPDES permit program to isolated wetlands in recent months.

Larry Kane, Bingham McHale, summarized the court decision from the perspective of the Indiana Builders Association. Although he agrees that the decision was clear with respect to the use of the NPDES permit program to regulate isolated wetlands, he believes that IDEM's jurisdiction over waters formerly under federal jurisdiction and over private ponds is subject to a case by case determination based on the particular facts at hand.

Final report and recommendations. The council considered and voted on proposed recommendations for inclusion in the final report, and approved the final report by voice vote of a majority of members appointed to the council.

To assist the council in its consideration of a proposed recommendation concerning solid waste management districts, Karen Firestone, Legislative Services Agency, presented a report on issues relating to recycling and solid waste management programs.

To assist the council in its consideration of a proposed recommendation concerning septic systems, Zachary Cattell, Indiana State Department of Health, described the department's current actions to delay for at least two years the effective date of the part of the proposed septic system rule that pertains to nitrate reduction in septic systems.

V. COMMITTEE FINDINGS AND RECOMMENDATIONS

A. The EQSC made the following recommendations, all of which were approved by a unanimous voice vote of the nine voting members in attendance.

1. Underground Storage Tanks

a. The General Assembly should authorize bonding through the Indiana Bond Bank or other qualified entities to leverage the funds in the Excess Liability Trust Fund (ELTF) to increase capacity to meet the demands of the fund.

- b. IDEM should not use more money from the ELTF than is actually needed to administer the program.
- c. IDEM, together with the Financial Assurance Board, should identify the long term demands on the ELTF and work to make sure the ELTF is solvent and can meet future demands.

State Revolving Funds

- a. The state revolving funds (SRF) should identify long term funding needs of communities from the SRF.
- b. The SRF should make every effort to get more loans into local communities by establishing competitive interest rates and loan criteria, and by streamlining the application and loan processes.
- c. The SRF should use “set asides” to facilitate construction of infrastructure.
- d. IDEM should be more proactive in seeking federal grant money.

Brownfields

- a. IDEM should review the State Cleanup Program, the federal Resource Conservation and Recovery Act, and the state Voluntary Remediation Program to see that cleanup standards are applied consistently to the three programs.
- b. Parallel cleanups of the same property under two different programs should not be required to be duplicative.
- c. For disposal of hazardous materials from a brownfield site in Kokomo, IDEM should look at every alternative to clean up the site, and only as a last resort should allow a hazardous materials landfill to be built within the city limits. If such a landfill is allowed, IDEM should allow disposition in the landfill only of hazardous materials from the brownfield site.

Air Issues

If vehicle emissions testing is implemented in non-attainment counties, the General Assembly should seek a funding method that provides for everyone that uses roads in Indiana to contribute to funding the testing.

Solid Waste Management Districts

- a. In Government Suppliers Consolidating Services, Incorporated vs. Bayh, 975 F.2d 1267 (7th Cir. 1992), Indiana Code sections concerning various aspects of backhauling municipal waste were found to be in conflict with the U.S. Constitution. Those code sections should be repealed or amended to conform to the court decision.
- b. The General Assembly should establish criteria for solid waste management districts to limit excessive cash balances and capital improvement funds.
- c. The General Assembly should look at funding mechanisms and funding parity for solid waste management districts.

Rulemaking

- a. The Indiana environmental rulemaking boards and IDEM should continue to increase their use of broad-based working groups during the rulemaking process.
- b. The Indiana environmental rulemaking boards should actively seek and utilize technical expertise outside of IDEM.

Waste Tires

- a. Allowing for innovative uses of waste tires, such as use as fill for septic systems, should be expedited.
- b. The waste tire statute should be reviewed for updates to meet current situations arising in the waste tire industry and with waste tire cleanups.
- c. IDEM should review collections of fees for new tires with the Indiana Department of State Revenue to ensure that the fees are adequately collected and accounted for.

Confined Feeding Operations

- a. As regulations are drafted, outreach to the regulated community (individual farmers) must be done by IDEM. This outreach should be led by IDEM, with support from the agricultural community.
- b. Animal agriculture regulations must be based on science.

Stormwater

- a. There is a potential adverse effect of the stormwater rules on agricultural lands. It is imperative that funding be fair to agriculture, as agriculture is sometimes seen as one of the solutions. It is important that farmland not be considered as the “sponge” to mitigate the costs of stormwater runoff.
- b. The local financing component required under the stormwater rules will have considerable negative impacts on local budgets. This needs to be considered as rules become effective and transition timelines are established between the state and local units of government. The source of funding for local compliance with stormwater rules will need to be addressed.

B. The EQSC also considered the following proposed recommendations, none of which received a sufficient number of votes to be considered an official recommendation. Of the nine voting members in attendance, all members voted for approval of each proposed recommendation except for the indicated member or members.

Air Issues

IDEM should work with the U.S. Environmental Protection Agency to remove a county from a designated non-attainment area if the county meets the required air quality standards. Being in a metropolitan statistical area should not be a criterion for being designated non-attainment. Voting against: Bill Hayden

Rulemaking

The Indiana environmental rulemaking boards and IDEM should continue to work with the Environmental Section of the Indiana State Bar Association on the rulemaking process and continue to keep the EQSC informed on improvements in the rulemaking process. Voting against: Bill Hayden

Septic Systems

The Indiana State Department of Health (ISDH) should not finalize the proposed septic system rules currently under consideration until some of the disputed issues have been resolved. The nitrate standard of 10 milligrams per liter or less is virtually unattainable with current technology. Under 327 IAC 2-11-2(b), ISDH may adopt rules “to eliminate or minimize, to the extent feasible, potential adverse impacts to the existing ground water quality.” That rule also states that in adopting rules an agency “may consider technological and economic reasonableness and other appropriate factors in determining a feasible approach”. ISDH should develop the rules using these guidelines. Voting against: Bill Hayden

Confined Feeding Operations

There is a need for more timely rules. Currently, Indiana producers are operating under uncertainty of environmental regulations that impact negatively on economic development opportunities for Indiana agriculture. Abstaining: Bill Hayden

Water Issues

a. The state needs to revisit its definition of "designated uses." The uses are impractical and impossible to meet "at all times, in all places". Voting against: Bill Hayden

b. The definition of "waters of the state" may need further examination, as a number of states have incorporated a category of "private waters" (agriculture related) that do not intersect with true "waters of the state." Voting against: Bill Hayden and John Ulmer

Wetlands

IDEM needs to continue to work with the U.S. Department of Agriculture Natural Resources Conservation Service to reach agreement on agricultural wetlands. Discussions have occurred for several years, but immediate resolution is needed on this issue to give the agricultural community a consistent definition of agricultural wetlands from the state and from the federal government. Voting against: Bill Hayden and John Ulmer

W I T N E S S L I S T

Tom Baker, IDEM
Bill Beranek, Indiana Environmental Institute
Joe Brister, Michelin North America
Sandi Bubbs, Gordon's Campground
Pat Carroll, IDEM
Zachary Cattell, Indiana State Department of Health
Howard Cundiff, Indiana State Department of Health
Miriam Dant, Baker & Daniels
Guinn Doyle, Barnes & Thornburg
Betsy DuSold, Eli Lilly and Company
John Fekete, Chairman, Water Pollution Control Board
Tonya Galbraith, IDEM
John Gastineau, Attorney for LaGrange County Sewer District
Mayor William Graham, Scottsburg
Mary Ellen Gray, IDEM
Dennis Harney, Indiana Manufactured Housing Association and Recreation Vehicle Indiana Council, Inc.
Gabrielle Hauer, IDEM
Scott Imus, Indiana Petroleum Marketers and Convenience Store Association
Lori Kaplan, IDEM Commissioner
Calvin Kelly, Indiana Development Finance Authority
Andrew Knott, Hoosier Environmental Council
David Lamm, Blue River Environmental
Anne LaRue, Everybody's Oil Corporation
Larry Kane, Bingham McHale
Senator Luke Kenley
Nancy King, IDEM
Janet McCabe, IDEM
Jim McGoff, State SRF Program
Maggie McShane, Indiana Petroleum Council
Tim Method, IDEM
Kay Nelson, Northwest Indiana Forum
Marcia Oddi, Environmental Information Solutions
Bruce Palin, IDEM
Jamie Palmer, Rural Wastewater Initiative
Ryan Pastorius, IDEM
Bernie Paul, Eli Lilly & Company
Bruno Pigott, IDEM
Glenn Pratt
Felicia Robinson, IDEM
Samuel Senn, Bascor
Brad Sugarman, Sommer Barnard & Ackerman
Maureen Swed, Shirley Heinze Land Trust
Joe Tutterrow, Rural Wastewater Initiative